No. 3771.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARTHA M. JACKSON, Executrix of the Last Will and Testament of ELMER B. JACKSON, Deceased,
Plaintiff in Error,
vs.
SUNLIT FRUIT COMPANY, a Corporation,
Defendant in Error.

Petition For Rehearing

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The Plaintiff in error, Martha M. Jackson, Executrix of the last will and testament of Elmer B. Jackson, deceased, hereby respectfully petitions this Honorable Court for a rehearing on the judgment rendered against her in the above entitled

action, filed herein on the 5th day of September, 1922.

In the opening brief of said Plaintiff in error there were presented to this Court for its consideration the claim of several separate and distinct errors claimed to have been committed by the trial court in the admission and exclusion of evidence at the trial of said action, but these alleged errors so far as disclosed by the judgment in this case were not considered by this Court on rendering its opinion.

The first and second errors complained of involved the admission of testimony as to matters of fact occurring before the death of Jackson under the provision of subdivision three of section 1880 of the Civil Code of Cailfornia. These errors, and the authorities cited supporting the same are fully pointed out in the opening brief of Plaintiff in Error and are fully discussed at pages 14, 15 and 16 of that brief.

The third and fourth errors relied upon for a reversal of the judgment of the trial court were the admission in evidence of the two fruit contracts (Plaintiff's Exhibits 5 and 6) made between Jackson and the corporation. The reasons why these contracts were inadmissible as evidence in this action are fully discussed in the opening brief of Plaintiff in Error at pages 17 to 30 of said opening brief. The contracts were required to be in writing under the provisions of section 1624 of the Civil Code of California, but on the part of the corporation they were not signed by any authorized officer or agent of the company,

as shown by the record, nor was any authority in writing to execute them on the part of the corporation ever given by the corporation to the party executing them on behalf of the corporation as required by section 2309 of the Civil Code of the State of California.

The sixth and seventh errors relied upon for a reversal of the judgment of the trial court consisted in the exclusion by the said Court of the offer of Plaintiff in Error to show the existing conditions brought about by the world war, and the effect of that war upon the contracts in question and the refusal of the trial court to permit plaintiff in error to show that defendant in error and other canneries had been compelled by the food administration to advance the price of peaches under the then existing long-term contracts, or that they had voluntarily made such advances. These errors are discussed at page 30 of the opening brief of plaintiff in error, and all of them are fully noted in said brief.

Plaintiff in error feels that this Honorable Court, in its decision rendered herein, should have expressed its views concerning these questions. That it did not do so was probably due to the fact that it did not agree with the disposition made of the case by the trial court as pointed out in the opinion.

In the discussion of the statute of the State of California relative to the sale and disposition of community property we wish to further emphasize our contention that, under Section 172 of the Civil Code, the contracts which form the basis of

this action, in order to be valid must have contained the written consent of the wife. The statute referred to reads as follows:

"The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto; and provided also, that no sale, conveyance or encumbrance of the furniture, furnishing and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife."

The attention of the Court is called particularly to that portion of the statute above quoted reading as follows: "provided, however, that he cannot make a gift of such community property, or convey the same *without a valuable consideration*, unless the wife, in writing, consent thereto."

What is an adequate consideration? We maintain that it is a consideration equal to or commensurate with the value of the property sold. In this case it was not equal to such value. The record shows that in certain years directly after the property was sold the market value of peaches was $100 to $110 per ton. The findings of the trial court placed the value at $60 per ton for the entire period of the contract after the alleged breach thereof. Under these facts it would hardly seem that the consideration was adequate.

At the trial we endeavored to show by the offer, as we affirm, of proper evidence that the consideration was not adequate. Peaches would not, owing to war conditions, be produced without great loss to the grower for $25 or $27.50 per ton. The trial court would not admit this testimony. Looking at the record what was the result of the judgment rendered in this action. Defend ant in Error was awarded the sum of $44,707.18. This sum represents a clear profit to the plaintiff in the action. Without the expenditure of one dime the corporation was permitted to bank almost $5000 a year for the period of nine years which represented a clear profit to it of nearly $200 per acre each year. Under these facts we feel justified in contending that the consideration named in the contract was not adequate, and that the contracts were void for that reason, in so far as they involved the interest of the wife of Jackson.

Under Section 172 of the Civil Code above quoted, the husband has the management and control of the community property with power to dispose of the same except by will. If he could not dispose of the community property by will can it be said that he had the power to dispose of it for a term of years after his death by contract?

We maintain that the community property referred to in the section quoted refers to and includes only such property as had an actual existence. It can not relate to personal property that came into existence after death of the husband. Crops until harvested are not personal property.

In the opinion rendered by this Court in this case it said: "We discover nothing in the language of the statute, nor in any of the decisions cited by counsel, requiring the wife's consent by writing or otherwise, to the husband's contract regarding the sale and delivery of the peaches to be grown upon the community land for a *reasonable period.*" We submit to the Court that there is nothing in the statute which defines a "reasonable period." There is no limitation as to the time the husband has the management and control of the community personal property; and if he can make a contract such as the one under consideration, binding the community interests for ten years after his death, then he may do so for any period of time.

We respectfully submit that a rehearing of the case should be granted.

Respectfully submitted,

A. H. HEWITT and M. M. GETZ,

Attorneys for Plaintiff in Error.

In the judgment of counsel for the Plaintiff in Error the foregoing petition for a rehearing is well founded and it is not interposed for delay.

A. H. HEWITT and M. M. GETZ,

Counsel for Plaintiff in Error.